Supplemental Testimony of

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before
Senate Committee on the Judiciary, Subcommittee on Administrative Oversight of the Courts

"Could Bankruptcy Reform Help Preserve Small Business Jobs?"

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Subcommittee Chairman Whitehouse, Ranking Member Sessions, and Members of the Subcommittee, I am submitting supplemental written testimony pursuant to the request of Chairman Whitehouse and Ranking Member Sessions made at the conclusion of the March 17, 2010 hearing. Again, what is set forth in this supplemental testimony constitutes my views, not those suggested to me by others. Additionally, I make these supplemental remarks in my individual capacity and not as a representative, member or officer of any group or organization.

Due to time limitations during the March 17, 2010 hearing, a couple of my remarks follow on some of what was testified to during the hearing. The residual deal with matters which I believe the Subcommittee should consider in the context of whether and how changes may be made to the Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (Bankruptcy Code), for purposes of facilitating successful reorganizations of small business bankruptcies.

1. Not Revenue Neutral, Feasibility a/k/a The Plan Works Analysis Mandated in Both Chapter 11 and Chapter 12, Cash Flow is the Issue Whether Called Administrative Priority Expense or Otherwise, and Business Acumen, Not Legal, is What Counts.

A. Likely Loss of Government Revenues.

During the March 17th hearing, the belief was expressed that amending the Bankruptcy Code to enable certain small businesses to reorganize under Chapter 12, instead of the currently applicable Chapter 11, would be revenue neutral as it regards the United States. However, this would not be the case. In reality, it would cause a loss of revenues to the United States and for the funding mechanism for the two groups given significant responsibilities under the

Bankruptcy Code: the United States Trustee Program (U.S. Trustee) and the Bankruptcy Administrator Program (Bankruptcy Administrator). This is due to funding of each by quarterly fees imposed in Chapter 11 cases. The fee is a minimum quarterly amount of $325.00 for disbursements in a quarter of less than $15,000.00 and increases based on quarterly disbursements by a Chapter 11 debtor until it reaches $30,000.00 for any quarter in which disbursements exceed $30,000,000.00. See 28 U.S.C. § 1930(a)(6)-(7). These fees are paid from the filing of a debtor's Chapter 11 case until the case is either converted or dismissed. For the six (6) bankruptcy court districts with a Bankruptcy Administrator , the fees received for fiscal year 2009 were approximately $2,400,000.00. As of the time of submission of this supplemental testimony, I have obtained the amount of these fees received for the eighty-four (84) bankruptcy court districts with a U. S. Trustee for fiscal year 2009. It was just over $118,500,000.00. Furthermore, the budget information set forth on the U.S. Trustee Program's website for fiscal year 2010 estimates revenues of about $136,000,000.00 and for fiscal year 2011 at slightly over $148,600,000.00.

Unlike Chapter 11, there is no fee paid to either the U.S. Trustee or to the Bankruptcy Administrator for cases filed under Chapter 12. To the extent that a significant number of cases now filed under Chapter 11 will elect to file under the National Bankruptcy Conference Proposal's (NBC Proposal) Chapter 12 , multiple millions of dollars in federal revenues received by the United States of Department of Justice for the U.S. Trustee and by the United States Courts for the Bankruptcy Administrator will be lost. Thus, any view that the proposed National Bankruptcy Conference (NBC) propounded amendments to Chapter 12 would be revenue neutral is inaccurate. What the result would be is be less revenue for the United States before taking into account the negative revenue effect arising from the Chapter 12 case filing fee being $800.00 less than that for a Chapter 11 case.

B. Feasibility By Another Name is Still Feasibility a/k/a The Plan is Likely to Work.

There has been a the contention by some that Chapter 12 looks at what is termed "feasibility" when confirming a plan and that, in contrast, this is not one of the factors reviewed before confirmation of a Chapter 11 plan. Feasibility is a term used to reference whether the requirement for confirmation of a Chapter 12 plan in 11 U.S.C. § 1225(a)(6) and an identical prerequisite of confirmation for a Chapter 13 plan in 11 U.S.C. § 1325(a)(6) have been met. Each imposes on the confirming court that it determine that "the debtor will be able to make all payments under the plan and to comply with the plan." Essentially, this means that the debtor will be able to perform the terms of the confirmed plan including, but not limited to, making all payments to creditors as and when specified in the plan. More simply, it is a determination that the plan is likely to work.

Although this "feasibility" language used by bankruptcy professionals in the context of confirmation of Chapter 12 and 13 plans does not appear in verbatim format in the confirmation section of Chapter 11, 11 U.S.C. § 1129, the feasibility concept is part of what is considered by all bankruptcy courts when confirming a plan of reorganization. The terminology is "[c]onfirmation of the plan is not likely to be followed by liquidation, or the need for further

financial reorganization, of the debtor or any successor of the debtor under the plan..." 11 U.S.C. § 1129(a)(11). Confirmation of a Chapter 11 plan has as a requisite that one being reorganized be able to perform under the plan so that liquidation or further reorganization will not likely occur. This is the import of § 1129(a)(11) even if the language is different from that used in §§ 1226(a)(6) and 1325(a)(6). Just as used when dealing with the similar provisions for Chapters 12 and 13, it is simply a long form of analyzing whether a plan of reorganization is likely to work.

So, the contention that Chapter 12 is a better avenue for reorganization for small businesses because "feasibility" is considered as part of the confirmation process for cases under Chapter 12 when it is not in Chapter 11 is unsupported. This arises from the fact that the same basic analysis is necessary under Chapter 11 of the Bankruptcy Code: whether the plan is likely to work.

C. Administrative Expenses, Utility Adequate Assurances and the Reality that What Counts is the Timing and Amount of these Payments Relative to Cash Flow.

(I) Dollar Amounts Not Necessarily Less.

Not having cash or the ability to obtain cash to pay a debtor's post bankruptcy ongoing obligations is a feature shared by most, if not all, bankruptcy reorganizations that fail. Some of the more astute debtors know that insolvency is likely to happen a long time before it occurs and plan in advance on how to meet the obligations requiring payment on a day to day basis during a bankruptcy case. If possible, they avoid complete depletion of cash and sources of cash. Likewise, they try not to fully collateralize debts with all assets. Conversely, the less fortunate or less astute begin the bankruptcy process having little or no cash and, at the same time, no or a very limited, ability to obtain cash because asset values have been fully utilized to secure debt. Since a large number of bankruptcy cases begin with debtors having little or no cash available to pay ongoing obligations and limited, if any, ability to borrow, paying day to day operating expenses is a major problem for this category of reorganization debtors. This is also a major reason why the majority of all reorganizations are unsuccessful.

So, the timing of revenues received and when and on what they are spent is critical to the successful reorganization of a business debtor's financial affairs. In fact, it is true of all debtors attempting to reorganize her/his/its financial affairs via the bankruptcy process.

The NBC Proposal for Chapter 12 to expanded its reach to include small business entities contains as one of its "fundamental flaws" of Chapter 11 for small businesses what it denominates as "Obstacles to Reorganization: Chapter 11 includes a set of procedures (due in part to the reforms of 2005) that create serious roadblocks to reorganization." The NBC's contention is that BAPCPA's change in the deposit requirements for utilities under § 366 of the Bankruptcy Code and what are called in bankruptcy jargon § 503(b)(9) claims – those which are

awarded an administrative priority claim status for goods received by a debtor within 20 days before a bankruptcy filing – coupled with lower administrative priority claims caused by the simplification and quickness of the bankruptcy reorganization process in Chapter 12 reduce the so-called Obstacles to Reorganization of Chapter 11. Perhaps the single most important aspect of this reduction in obstacles is that Chapter 12 allows payment of administrative priority claims over time compared to the Chapter 11 mandate of relative immediate payment on confirmation unless administrative priority claim holders otherwise agree. Compare 11 U.S.C. §§ 1129(a)(9)(A) with 11 U.S.C. § 1222(a)(2), 1225(a)(1).

One point I wish to make is that the extent to which, if at all, the § 366 utility adequate assurance of payment, § 503(b)(9) administrative expenses, professional and related costs of reorganization, and the pay over time Chapter 12 payment of administrative expenses have significance varies by case. It is also that they may not matter in some cases along with the fact that payment via a Chapter 12 case may cause reorganization to fail when it might have succeeded in a Chapter 11 case. Why these are so in a given case needs amplification.

If one looks at what are the administrative expense categories under § 503 of the Bankruptcy Code, a number of administrative expenses will be the same in a Chapter 12 as in a Chapter 11. These may include, but not exclusively, wages and salaries, lease payments, taxes, and other costs and expenses incurred in connection with preserving a debtor's business. With the exception of the types of expenses incurred solely as the result of a bankruptcy case having been filed such as additional lawyer, accountant, and other professional fees and costs, all of the other categories of administrative expenses should be expected to be virtually identical in kind and amount in a Chapter 12 as in Chapter 11. This means that what I will call Bankruptcy Generated Expenses must be where the savings are to be achieved in order for a Chapter 12 debtor to have lower total cash demands than a Chapter 11 one might have.

In any given case, the § 366 utility adequate assurance requirement may vary from being negligible to large. For businesses in the extractive category, coal mining for example, and in the heavy industry category, making steel or aluminum, utility bills and as a result demands for adequate assurance may be in the hundreds of thousands of dollars and more. For other businesses such as some of those in the service sector, utility expenses and, as an outcome, adequate assurance may be very small. The same range of § 503(b)(9) administrative expense payments exists. Those with little or no need for "goods" that might have been received within 20 days of filing a bankruptcy by a debtor, a law firm, accounting firm, employment agency to name a few, will have relatively little or no administrative expenses in this category. Those in the retail sales businesses would be expected to have larger and possibly very large § 503(b)(9) administrative expense claims. However, nothing in Chapter 12 makes the dollar amount of § 336 utility adequate assurance or of § 503(b)(9) claims different from the amount they would be in Chapter 11. The important aspect is that of the Bankruptcy Generated Expenses caused by

§ 503(b)(9) and § 366 requirements, they is no different in Chapter 11 than in Chapter 12. The unassailable consequence is that the dollar amounts of these are equal obstacles in both chapters.

The same is true in Chapter 12 for the timing of the provision for, or payment of, adequate assurance for utilities. The time periods are identical for both chapters of the Bankruptcy Code. See 11 U.S.C. § 366. Unless one alters § 366 to afford Chapter 12 debtors more lenient treatment when it comes to adequate assurance protection for utilities, this means the utility adequate assurance imposition on a debtor based on when it must take place cannot be any more of an obstacle to reorganization in Chapter 11 than in Chapter 12. Conversely and for payment of § 503(b)(9) claims, there remains a difference under the statute which is the timing of payment of these claims. A debtor in Chapter 12 has the ability without agreement of administrative priority expense creditors to spread payment of these expenses over time following confirmation of a plan which he/she/it may not do in a Chapter 11 without creditor agreement. A little more discussion of the amount of Bankruptcy Generated Expenses is warranted before looking more closely at the timing of payment of administrative priority expenses.

What is left of the Bankruptcy Generated Expenses is principally the lawyer, accounting and other professional fees and costs caused by the reorganization process. To have a successful reorganization, the financial and business plan development, which should not be confused with the drafting of the plan documents, of a given debtor should involve about if not the same costs in a Chapter 11 and 12. This is due to the fact that the same business and financial analysis should be done for a given debtor in either context to have a successful reorganization. Of course, this assumes that one does not view Chapter 12 as a mechanism to avoid or minimize such critical financial and business analysis and structuring. If this were the case, I suggest that Chapter 12 would be counter productive to the success of any small business reorganization.

Likewise, many of the other categories of Bankruptcy Generated Expenses that fall into the professional fees and costs categories would be expected to be the same in both chapters. Some in this category are costs caused by objections to claims, valuation of assorted properties, and adversary proceeding litigation. Others that may be greater in a Chapter 11 case are those associated with rejection of collective bargaining contracts, voting, classification of claims treatments which are essentially those incurred by the more detailed technical legal requirements of what is included in a Chapter 11 plan and its confirmation which are not necessitated in Chapter 12. In some instances, these will be small in difference between those incurred in a Chapter 12 versus a Chapter 11. In others, especially the larger and more complex cases, they will be greater in Chapter 11. In yet others, they may be the same regardless of the chapter utilized for reorganization. The NBC is correct that a savings is potentially achievable in some Bankruptcy Generated Expenses in some bankruptcies when one files a case under the NBC Proposal for Chapter 12 compared to Chapter 11. As importantly, there will not be such savings in all cases.

This is only part of the picture of the size of Bankruptcy Generated Expenses. Chapter 11 has an associated expense of U.S. Trustee or Bankruptcy Administrator fees not imposed on a Chapter 12 debtor. See 28 U.S.C. § 1930(a)(6)-(7). On the other hand, Chapter 12 has another type of fee paid to the trustee of a Chapter 12 case. See 11 U.S.C. §§ 326(b), 1226(a)(2). In some cases, the fees paid to a Chapter 12 trustee may exceed those paid to the U.S. Trustee or Bankruptcy Administrator in a Chapter 11 case. In others, the reverse may be what happens. As a consequence, Chapter 12 is not necessarily the least expensive when it comes to trustee types of fees. It depends on the percentages/amounts of such fees and the amounts of monies disbursed or received under the applicable standard for determining such fees.

(II) Timing in the Eyes of a Debtor: Faster is Not Always Better.

The remaining significant point in the NBC Proposal for why the Obstacles to Reorganization are less in Chapter 12 is that one has the ability without creditor agreement to pay administrative priority expenses over time following plan confirmation when one may not do likewise without creditor agreement in a Chapter 11. It is asserted that this makes reorganization under Chapter 12 more likely to be successful. As with some of the items of expenses associated with bankruptcy which do not differ in amount between Chapters 11 and 12 and those not necessarily less in a Chapter 12 than in Chapter 11, the ability to pay administrative expenses over time is not, in all instances, a benefit. It will in some instances be a detriment when one understands how creditors are supposed to be paid under a plan.

Why this is so arises from the costs to a debtor associated with a delay in payment of other creditors necessarily arising from deferring payment of administrative priority expenses over some time period following confirmation of one's plan. For example, any delay in payment of an allowed secured or an allowed unsecured claim will in certain instances result in an increase in what is required to be paid to a creditor(s) holding such a claim(s) over what it would otherwise have been. The increase from delaying payment to these categories of secured and unsecured claims is, in some Chapter 12 cases, but not all, required by what is in reality a present value equivalence imposed by 11 U.S.C. § 1225(a)(4), (a)(5)(B)(ii), and (b)(1)(A). To the extent that these allowed secured or allowed unsecured claims are large enough in dollar amount and/or the discount or interest rate factor is high enough, the increase in total payments over time incurred by paying administrative priority expenses in a deferred fashion may during the debtor's repayment period actually increase the aggregate cash flow demands on a debtor over those of one under Chapter 11.

All of this potential for increases in cost and aggregate cash flow requirements for some Chapter 12 debtors coming from a delay in payment of administrative priority expenses is complex due to both the technical legal requirements and the present value equivalent determinations. Fortunately, an easier description is that what can occur is that the impacted secured and unsecured creditors are making a forced loan to a debtor for which in some, but not all, cases the Chapter 12 debtor will be required to pay them added monies for the further stretching out of payments to them under the Chapter 12 plan than may have otherwise been the

case. This delay in paying administrative priority expenses extends out repayment of some claims because it will ordinarily cause a lowering of monthly, quarterly, semi-annual or annual payments from what might have been paid on, for instance, a secured claim so that the increased interest over the longer payback period exceeds the aggregate of what the cash demands would have otherwise been. All of this arising from a delay in payment of administrative priority expenses for want of having sufficient cash flow at confirmation of a plan under Chapter 12. In fairness to the NBC's position, the ability to defer payment on administrative priority expenses should in almost all instances reduce the initial cash flow requirements, but for some this initial deferment may be at the expense of longer term survival of the business. Fortunately, this sort of increased cost and aggregate cash flow requirements is not often seen or recognized in reorganization cases.

Once again, it is not a universal fact that Chapter 12 always avoids what the NBC defines as Obstacles to Reorganization. Sometimes the dollar amounts are the same or less in a Chapter 12 case than in Chapter 11 when it comes to administrative priority expenses. They should never differ when it comes to § 366 utility adequate assurances and in dollar amount the administrative priority expenses may be less in some Chapter 11 cases than in a Chapter 12. At the same time, the cash flow demands of paying administrative priority expenses over time may actually be greater in aggregate amount over the relevant time period in some Chapter 12 reorganizations.

What must be coupled with this factor is that what happens in a Chapter 12 case is a relatively quicker disbursement from a debtor to a trustee from what may be a restricted cash availability. When compared with the bankruptcy statute's longer breathing room to accumulate cash and obtain higher cash flow levels to assist in repayment of administrative priority expense claims that is implicit in the longer time given to develop a Chapter 11 plan and have it implemented, Chapter 12 presents a greater cash flow obstacle to reorganization for some debtors than that faced under Chapter 11. The summary is that the Chapter 12 template is not the panacea for all small businesses because for some the NBC's argued "fundamental flaws" of delay, high costs and obstacles to reorganization are flaws of Chapter 12 for some small business debtors when they are not under Chapter 11.

D. Trustees and Business versus Legal Acumen.

Some of the testimony has been to the effect that a Chapter 12 trustee possesses the capabilities to provide continuous and unbiased information about a debtor's viability including oversight of business operations. While it is accurate that Chapter 12 trustees have and continue to provide information regarding a debtor's operations, the focus of virtually all of what a Chapter 12 trustee does is in the framework of whether the debtor has and continues to comply with what is required of her/him/it under the legal requirements of Chapter 12. These involve checking on receipts and disbursements made by a debtor, payment of post petition obligations by a debtor, submitting the requisite documents and plans to the court, valuation of properties, and seeing that a debtor is performing the other bankruptcy law obligations.

These sorts of duties are distinctly different from knowing and giving business plan and financial plan advice and being able to assess from a business perspective whether what is proposed for the day-to-day operations of any business will assist it in achieving its reorganization goal. As a general matter, trustees do not advise on hiring and firing of employees, advertising, sales goals, from whom to purchase inventory and supplies, how to expand sales territories and a plethora of similar day to day and long term activities of a business. These are precisely the types of business information and direction that many small businesses lack and need.

Why almost all Chapter 12 trustees lack the ability to provide this sort of counseling is that the overwhelming majority of trustees in bankruptcy cases are lawyers without the magnitude and level of business education and experience to be able to properly give advice in most business arenas. In reality, most lawyers have no educational background in business subjects and their business experience is limited to that obtained in the practice of law if he or she actually was involved in the operation of a law practice. This is not the business acumen called for by most businesses hoping to successfully reorganize. A trustee's performance of Chapter 12 duties is not a substitute for the business expertise needs of most small businesses. Once more, this assumes that Chapter 12 will not be utilized as a method of avoiding what should be done to successfully reorganize a business.

It is this business expertise required by many small businesses which will be caused to be absent in a Chapter 12 redesigned under the NBC Proposal. This arises in large part by the structural difference between the plan process in Chapter 12 versus that in Chapter 11, that is, the non-consensual Chapter 12 one versus the Chapter 11 consensual conceptualization. It is also the outcome of believing that a Chapter 12 trustee is a substitute for one with business expertise. Implementing such a view toward necessary business expertise has and will inevitably lead to the failure of reorganizations.

2. Considerations for Small Business Modifications.

A. Definition of a Small Business Should Not Include Large or Complex Businesses.

As is clear from my March 17, 2010 testimony, both oral and written, the NBC Proposal is premised on a definition of a small business that includes within its scope businesses with tens of millions of dollars to billions of dollars in assets. For this reason, the simple rubric of allowing one with $10,000,000.00 or less in aggregate debt to be able to file under the NBC Proposal for Chapter 12 is too broad in reach. As the Cover Sheet Summary and the Summary of Schedules Summary data submitted with my March 17, 2010 written testimony indicate, the current definition of a small business entity offered by the NBC brings within its definition hundreds to thousands of entities that are not small businesses by anyone's reasonable definition of what a small business truly is. For this reason, a better demarcation between small businesses and others must be found.

Even though using aggregate debt may be an easy method to identify a small business, its use without other gauges will always enable numerous non-small businesses with little or no debt to be placed in the small business category. A review of what is used by others in a non-bankruptcy setting such as by the United States Small Business Administration, securities laws, and business publications reveals a wide disparity in what is called a small business. There is, however, a common definition creating methodology. It is that each looks at more than one factor. The factors considered usually encompass more than one of debt, assets, annual revenues, and number of employees.

In the realm of bankruptcy reorganizations and should Congress want to increase the small business total debt level from where it is now, approximately $2,200,000.00, to a larger sum, the inclusion of an additional factor to demarcate between a small business and larger ones will assist in limiting the number of businesses that are not truly small from being within the scope of any small business classification. Two of the more easily used factors are annual revenues and number of employees. Adding a limit on annual revenues and/or the number of employees will help to achieve a truly small business class for reorganization purposes. This is because larger annual revenues and a greater number of employees indirectly approximates what is not a small business in terms of size and/or complexity. It suffices for now that an additional factor or factors should be employed to limit any small business provisions to only small businesses.

B. Favored Consensual Structure of Chapter 11 Need Not Be Abandoned.

One of the more costly and time consuming aspect of the current provisions governing reorganizations under Chapter 11 for all sizes of businesses are those governing disclosure statements and plans of reorganization. One vehicle to lessen both is the NBC Proposal's adoption of the Chapter 12 plan structure. Partially, its structure is the impact from having been modeled on what was originally designed for non-business individual debtors, that is individuals in Chapter 13 that rarely have the complexities of a business case. The rest comes from what is the most significant structural difference between Chapter 12 and Chapter 11.

In its essential form, a Chapter 12 plan is non-consensual. This means that, among other factors, no creditor agreement to a plan is needed to have it confirmed. It also does not allow a creditor to propose a plan. So long as a debtor includes in a plan the when and the amount of how creditors are to be paid which comports with the amounts and time period of Chapter 12's requirements, a plan is potentially confirmable. This enables a debtor to continue to utilize the collateral/monies of a creditor without having his/her/its consent. All that a creditor may do in a Chapter 12 case to avoid a confirmation that harms his interests is object to what is in a plan based on its not complying with the requirements of Chapter 12.

Contradistinguished to Chapter 12, Chapter 11 favors, if possible, achieving a degree of creditor support for reorganization. For a consensual plan, this is set by the acceptance standard of 11 U.S.C. § 1126 (c) & (d) of at least two-thirds (2/3) in dollar amount and more than fifty

(50%) percent in the number of claims/interests in each impaired class agreeing to the terms of a plan. This acceptance standard may be avoided by having no class of creditors being impaired – they are deemed to accept the plan under 11 U.S.C. § 1126(f) – which infrequently occurs or by using the cram down provision of Chapter 11 which still requires that at least one non-insider class of impaired claims vote in favor of a plan so long as unfair discrimination is avoided and fair and equitable treatment is accorded impaired claims and interests. See 11 U.S.C. § 1129(a)(10), (b).

Ways exist to retain the favored consensual nature of plans of reorganization of Chapter 11 for small businesses while reducing the costs, time, and complexities involved. Only a few will be suggested at this juncture in the process of the Subcommittee's deliberations. This arises from the fact that it is difficult to propose modifications until one knows the scope of what may be a small business under a revised definition. A few that could be altered are the dollar amount of claims of a class accepting a plan and/or the percentage of number of claims in a class. Each could be lowered making confirmation easier, yet still founded on the favored consensual standard. In fact, one could be retained at a lower amount, e.g., less than two-thirds in dollar amount or only ifty (50%) percent in number, while the other is eliminated. A change of this sort would retain to a degree the favored consensual nature of a reorganization plan and allow creditor input into the plan adoption process that may be avoided in a Chapter 12 context. Other current aspects of what Chapter 11 necessitates for a small business are capable of easing or elimination.

It is the complexities of what is desired to occur for all small businesses that makes further recommendations problematic. Does Congress want to eliminate the retiree benefit payment provision for confirmation of 11 U.S.C. § 1129(a)(13) or the rejection of collective bargaining agreement requirements of 11 U.S.C. § 1113 for small business cases? Allowing small businesses to reorganize under Chapter 12 will have this effect, but Chapter 11 will not unless these are also eased or eliminated for small business Chapter 11 cases. To the extent that these and other of the currently applicable statutory conditions for reorganization under Chapter 11 are deemed unnecessary or unwanted by Congress, additional simplification of what Chapter 11 now requires is achievable. That which is determined to be unnecessary or unwanted controls much of what further simplification may be made to Chapter 11 for small business cases.

In the event that new small business standards are set that ease what is currently required to confirm a plan and despite what chapter may be the vehicle for such changes, one category of what is necessary that should not be eliminated is having business and financial plans prepared by those with the requisite degree of business experience and expertise. These are absent or deficient in both Chapter 12 cases and small business Chapter 11 cases to an extent that should now exist. More meaningful and detailed business and financial planning needs to exist for many small businesses undergoing reorganization whether they be farmers, fishermen, or the residual of what comprises a small business.

C. Intuition may be Incorrect and Good Data Needs to be Obtained.

A component of the NBC Proposal is raising the total liability amount from its current level of approximately $2,200,000.00 to $10,000,000.00 on the premise that this sum better reflects what is a small business for bankruptcy reorganization purposes. At this juncture and based on more information obtained from the Administrative Office of the United States Courts since the March 17, 2010 hearing which demonstrate that the reliability of the data regarding small businesses is more questionable, caution in what is being proposed is even more important.

Regardless of the dollar amount ultimately fixed, a warning from my earlier testimony needs repetition. It is that the data from the Summary of Schedules Summary and the Cover Sheet Summary are not verified for debtor accuracy and evidence some problems exist with setting what is in or out of a small business classification based on current information. Also and by repetition, this data is used because it is a lot of what was the critical data employed in development of the NBC Proposal.

From the Summary of Schedules Summary, 8,746 out of a total of 12,799 Chapter 11 cases for 2009 had total liabilities of $2,200,000.00 or less. This is 68.33% of all Chapter 11 cases filed in 2009. For those with greater than $2,200,000.00 in total liabilities, there were 4,053 cases or 31.67% of Chapter 11 case filed in 2009 disclosing this information. If one excludes the 5,112 cases that reported both zero assets and zero liabilities on the summary of schedules, the data indicates that 3,634 Chapter 11 cases had $2,200,00000 or less in total liabilities which constitutes 47.275% of the adjusted total of 7,687 cases and 4,053 cases reported liabilities of over $2,200,000.00 or 52.725%. The $2,200,000.00 or less total liability cut off was selected because it approximates the small business total liability limitation for Chapter 11 cases in 2009.

A review of the Cover Sheet Summary reveals that a similar break point for data at the $2,200,000.00 amount is not captured by Official Form 1. Regardless of this fact, some relevant information may still be ascertained. Of the 12,799 Chapter 11 cases filed in 2009 with Official Form 1 completed, 3,713 or 29.01% had total liabilities of $1,000,000.00 or less. For the range of zero to $10,000,000.00 in total liabilities, there were 8,546 Chapter 11 cases or 66.771%. For cases with over $1,000,000.00 to and including $10,000,000.00 in <u>both</u> total assets and total liabilities, the number of 2009 Chapter 11 cases was 3,198 or 24.986%. This category represents the single largest grouping of cases with assets and liabilities within the same dollar range on Official Form 1.

What the Summary of Schedules Summary indicates is that from over 47% to up to approximately 68% of Chapter 11 cases filed in 2009 disclosed $2,200,000.00 or less in total liabilities and qualified for small business treatment. Although not as useful, the Cover Sheet Summary lets one know that over 30%, but less than 67% of Chapter 11 cases filed in 2009 had set forth $2,200,000.00 or less in total liabilities and would have been able to go forward under the small business provisions of Chapter 11.

The additional data I have obtained is a summary of Chapter 11 cases started in 2009 and whether the initial documents filed showed whether a Chapter 11 debtor was a small business. It is page 14 to this supplemental testimony and is captioned Small Business Designation (Small Business Designation). This Small Business Designation demonstrates that there were actually a total of 15,189 Chapter 11 bankruptcy cases filed in calendar year 2009. Only 3,212 debtors disclosed its/her/his small business status. This is 21.1% of total Chapter 11 filings in 2009. Whether this number and percentage of small business cases is more or less accurate than that from the Summary of Schedules Summary or the Cover Sheet Summary is not known. It is most likely too low due to the fact that 1,521 filings left this disclosure blank and it is unlikely that all were not small business filings. This disparity from the Summary of Schedules Summary and the Cover Sheet Summary is both unfortunate for analytical purposes and is a state of affairs that should not and need not exist.

All that may be learned is that no less than 21.1% of the total of all Chapter 11 cases filed in 2009 were classified as a small business by the debtors and the actual number and percentage may be much greater. To ascertain just what debt level with or without another factor should be used to sort the real small businesses from the larger or more complex ones, reliable data is necessary to a greater degree to make certain that decisions are made on facts, not intuition.

All that has been set forth regarding data deficiencies illustrates problems with current data that should be more closely scrutinized. To not do so could lead to enactment of legislation ill designed to achieve the goals sought. This inconsistent data on small businesses also demonstrates why a proper design of what information should be obtained and how to retrieve it ought to have occurred years ago. Why it must be done is to insure that intuition and incomplete or misleading use of data are not the foundations for what are proposed major changes in the structure of how most businesses reorganize in the United States. Why this must be the case for how bankruptcy law changes are made is that reliable data evidences that what is intuited from incomplete information is often wrong and what is counter-intuitive is the correct state of affairs.

3. Conclusion.

Chapter 11's favored consensual plan of reorganization need not be abandoned in favor of non-consensual plans under Chapter 12. Rather, further easing of existing requirements of Chapter 11 for small businesses can achieve many, if not most, of what is sought under the NBC Proposal without fundamentally altering the dynamics of what is expected to happen for businesses reorganizing in bankruptcy. This may be achieved with a smaller impact on those who participate in the bankruptcy process by a better definition of what constitutes a small business entity to insure that large businesses or those with complex operations are not within any small business classification. Caution needs to be a guiding principle when considering expanding Chapter 12's reorganization format because there is a fundamental difference between these Chapters and the debtor-creditor positions on numerous issues of moment to both.

Some perceive that my testimony indicates I am not sympathetic to a redoing of the bankruptcy laws for truly small, non-complex businesses. This view is incorrect. Rather, what I believe needs to occur is a better defining of "small business" so that a better and more successful template may be developed in a setting where one may more readily and accurately know what other alterations are needed and workable for such "small business" entities.

Despite giving only a limited number of suggestions to facilitate greater success in the reorganization of small businesses, I am willing to offer others and to work with all interested parties for improving the process once a clearer determination of what constitutes a small business is made. As indicated earlier and until a more limiting definition is invoked, other suggestions are, at best, speculative on their necessity and impact on parties to a business bankruptcy reorganization case.

Small Business Designation
Chapter 11 Business Cases Filed During Calendar Year 2009

District	Total	Blank	No	Yes	Percentage Small Business
DC	50	6	37	7	14.0%
ME	53	3	33	17	32.1%
MA	230	34	133	63	27.4%
NH	57	6	43	8	14.0%
RI	20	1	12	7	35.0%
PR	158	9	78	71	44.9%
CT	139	17	71	51	36.7%
NY,N	54	2	34	18	33.3%
NY,E	264	27	154	83	31.4%
NY,S	1,709	26	1,595	88	5.1%
NY,W	55	1	23	31	56.4%
VT	3		2	1	33.3%
DE	1,481	17	1,452	12	0.8%
NJ	428	51	262	115	26.9%
PA,E	151	9	93	49	32.5%
PA,M	49	3	20	26	53.1%
PA,W	181	15	90	76	42.0%
VI	4		2	2	50.0%
MD	280	74	151	55	19.6%
NC,E	154	18	100	36	23.4%
NC,M	34		25	9	26.5%
NC,W	99	15	57	27	27.3%
SC	112	26	56	30	26.8%
VA,E	247	35	144	68	27.5%
VA,W	38	2	23	13	34.2%
WV,N	16		10	6	37.5%
WV,S	25	3	11	11	44.0%
LA,E	53	2	33	18	34.0%
LA,M	24	1	14	9	37.5%
LA,W	71	3	29	39	54.9%
MS,N	30	1	23	6	20.0%
MS,S	37	3	26	8	21.6%
TX,N	450	5	360	85	18.9%
TX,E	99	10	63	26	26.3%
TX,S	370	17	208	145	39.2%
TX,W	327	12	264	51	15.6%
KY,E	43	5	28	10	23.3%
KY,W	58	1	31	26	44.8%
MI,E	193	12	104	77	39.9%
MI,W	66	5	38	23	34.8%
OH,N	142	7	108	27	19.0%
OH,S	99	4	62	33	33.3%
TN,E	97	8	47	42	43.3%
TN,M	214	56	100	58	27.1%
TN,W	78	10	34	34	43.6%
IL,N	384	38	267	79	20.6%
IL,C	30	1	17	12	40.0%
IL,S	30	1	9	20	66.7%
IN,N	64	2	48	14	21.9%
IN,S	100	8	62	30	30.0%
WI,E	81	1	49	31	38.3%
WI,W	44	3	26	15	34.1%
AR,E	42	3	18	21	50.0%
AR,W	54	5	23	26	48.1%
IA,N	9	1	8	-	0.0%
IA,S	12	-	5	7	58.3%
MN	96	8	68	20	20.8%
MO,E	40	2	29	9	22.5%
MO,W	76	7	56	13	17.1%
NE	41	4	22	15	36.6%
ND	6	1	-	5	83.3%
SD	15	1	12	2	13.3%
AK	21	1	10	10	47.6%
AZ	613	102	375	136	22.2%
CA,N	379	123	196	60	15.8%
CA,E	226	43	115	68	30.1%
CA,C	1,126	206	784	136	12.1%
CA,S	115	28	71	16	13.9%
HI	18	1	10	7	38.9%
ID	51	7	32	12	23.5%
MT	32	3	25	4	12.5%
NV	445	88	301	56	12.6%
OR	59	10	41	8	13.6%
WA,E	50	3	38	9	18.0%
WA,W	205	34	111	60	29.3%
GU	2	-	2	-	0.0%
CO	187	8	124	55	29.4%
KS	87	4	53	30	34.5%
NM	49	8	19	22	44.9%
OK,N	10	-	9	1	10.0%
OK,E	6	-	5	1	16.7%
OK,W	51	5	34	12	23.5%
UT	91	7	62	22	24.2%
WY	19	2	12	5	26.3%
AL,N	120	10	84	26	21.7%
AL,M	37	2	16	19	51.4%
AL,S	64	6	46	12	18.8%
FL,N	34	3	22	9	26.5%
FL,M	644	98	382	164	25.5%
FL,S	284	22	203	59	20.8%
GA,N	371	42	186	143	38.5%
GA,M	52	2	34	16	30.8%
GA,S	75	5	52	18	24.0%
Totals	15,189	1,521	10,456	3,212	21.1%